

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





DOCKET NO.

# 75-7087

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

B

SCHUYLER MARKET, INC., and  
NATALE DE MARTINO,

Plaintiffs-Appellants,

v.

EARL BUTZ, as Secretary of Agriculture  
of the United States,

Defendant-Appellee.

P/S

BRIEF FOR PLAINTIFFS-APPELLANTS,  
SCHUYLER MARKET, INC., and NATALE DE MARTINO

APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK



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STATEMENT OF ISSUES

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- I. Did the Trial Court err in striking out Schuyler's demand for a jury trial. 10
- II. Should the Government have been held to have the burden of proving that Schuyler and De Martino violated the regulations of the Food Stamp Act as alleged in the letter of April 1, 1974. 12
- III. Did the Trial Court err in finding that plaintiffs (Schuyler and De Martino) failed to prove by a fair preponderance of the evidence that the order (Ex.8) was invalid. 14



### STATEMENT OF THE CASE

The case came on for trial before Hon. Charles M. Metzner, District Judge for the Southern District of New York on December 11th and 12th, 1974.

After having struck out the jury demand of Schuyler Market and De Martino, Judge Metzner ruled that the burden is on Schuyler Market and De Martino to prove that the order of the Department of Agriculture is invalid (S.M. p.7,8) and denied the application that the Government must first show that there was an actual violation and refused to put such burden on the Government.

Exhibits 1 to 8 spell out the nature of the proceedings before the administrators of the Food Stamp Program.

Exhibit 2 (App. p. 15), the last paragraph, asks for "an open, oral hearing before an appropriate administrative officer where witnesses of my client as well as the accusers may face each other and be subject to cross-examination." Exhibit 3 (App.p.16), the reply to that request states: "Neither the Food Stamp Act nor the Regulations provides for such a hearing at this time."

Then without any hearing or evidence exposed to the retailer, the Regional Director determined to disqualify Schuyler from participating in the Food Stamp Program for a period of one year. (App. p.17-Ex.4-paragraph 2).

A request for review was timely made (App.p.19,Ex.5)

and again a request "that the persons who alleged the violations contained in the letter dated April 1, 1974 be required to appear before such Review Officer and be questioned by counsel" (next to last paragraph of that letter).

Affidavits by employees of Schuyler Market were forwarded to the Food Stamp Review Officer (App. p.20 Exhibit 6) and again a request is made for an opportunity to have the accusers appear.

The reply to that request states: (App. p.21, Ex.7)

"You also requested that the persons who alleged the violations contained in the letter dated April 1, 1974 be required to appear before the Review Officer and be questioned by counsel. Formal discovery procedures and an adversary hearing are not required by the Food Stamp Act nor contemplated by the Regulations. Thus, neither testimony by Department witnesses nor cross-examination of such witnesses is included as a part of either disqualification or administrative review procedures. However, the Act does provide for a trial de novo in the U.S. District Court or a State Court of competent jurisdiction in case your client is not satisfied with the Review Officer's determination."

The clear implication is that a dealer must wait for a trial de novo to face his accusers. Yet when he got to the District Court, the dealer was held to have the burden of proof.

On September 13, 1974 a so-called hearing was held before a Mr. Spear, as Review Officer, which was not in fact any sort of hearing. No accusers appeared. Not a thing in addition to what was in the letter of April 1, 1974 (Ex.1) was given to De Martino. Mr. Spear says in his letter that the "file (emphasis supplied) furnished me" was the basis of his determination. He does not state that he interviewed



the accusers or cross-examined them, even in the absence of the dealer.

Pursuant to the Food Stamp Act, an action was commenced to set aside the determination of the Review Officer of the Department of Agriculture. The case came on for trial before Judge Metzner who dismissed the complaint holding "that the plaintiffs have failed to prove by a fair preponderance of the evidence that the order (pls. Ex.8) attacked is invalid".

This appeal is from that order.

#### PRELIMINARY STATEMENT

The references to pages in the Appendix are designated by (App. followed by page number) on the bottom centre of the page. The pages in the Stenographer's Minutes are designated by (S.M. followed by the Stenographer's or Court Reporter's number in the upper right corner of the page).

Schuyler Market, Inc. is a singly owned supermarket located at 689 Columbus Avenue, (93rd Street), New York City. Schuyler Market, Inc. has been authorized to participate in the Food Stamp Program as a retailer since August, 1970.

By letter dated April 1, 1974, the Regional Director of the Food Stamp Program of the Department of Agriculture notified Schuyler Market, Inc. that there was a reason to believe that it had violated the regulations of the Food Stamp Program on certain days between May 23, 1973 and June 6, 1973 approximately eleven months prior to Schuyler's receipt of that letter (App. p. 11-Ex.1).

Schuyler, by its attorney, replied to this letter, denying the accusations and requested an open, oral hearing before an administrative officer where witnesses on both sides could face each other and be subject to cross-examination (App. p. 14-Ex.2).

By letter dated May 20, 1974, the Regional Director replied that no such hearing is provided for in the Food Stamp Act or Regulations. However, if it should be



determined that Schuyler be disqualified, it may request an "administrative review by the Food Stamp Officer." (App. p. 16-Ex. 3).

Nothing further was heard from the Department of Agriculture until Schuyler received a letter from the Regional Director dated July 11, 1974 stating that the Department determined that Schuyler had violated the regulations and it was disqualified from participating in the food stamp program (App. p.17-Ex.4).

A request for administrative review was then made on behalf of Schuyler (App. p.19-Ex.5) and affidavits of denial by the three employees of Schuyler named in the accusatory letter were mailed to the Department Review Officer (App. p.20,25-Ex.6,9).

By letter of July 24, 1974 of the Director of the Food and Nutrition Service, Schuyler was notified that an adversary hearing is not required by the Food Stamp Act nor contemplated by the regulations. Neither testimony by Department witnesses nor cross-examination is included in disqualification or administrative review procedures (App. p.22-Ex.7).

On September 13, 1974, a Mr. Marshall Spear, who was designated as the Review Officer met with Natale De Martino and his attorney. No other persons were present. No stenographer was present. No notes were taken. Mr. Spear asked what Mr. De Martino had to say. Mr. De Martino re-

plied that no such violations took place; that no one from the Department had called his attention to these alleged violations until he received the letter dated April 1, 1974, approximately eleven months after they were supposed to have taken place; that no one confronted him at the times these alleged violations took place; that at a much later time than the dates of the alleged violations, some representative of the Department of Agriculture approached him and asked for names of persons regularly employed; that he gave him the names of the three persons that were now mentioned in the letter of April 1, 1974; that nothing was said to him by the representative about the reasons for these names. Mr. Spear asked no further questions, offered no information or any further details with respect to the alleged violations in the letter of April 1, 1974 and said the Department was not required to produce any witnesses for questioning. This was the extent of the so-called administrative review.

After the receipt of the letter dated September 18, 1974 (App. p.22-Ex.8) from Mr. Spear as the Review Officer, this action was duly commenced by Schuyler and Natale De Martino to set aside and annul the determination of disqualification from the Food Stamp Program for a period of one year.

The answer of the Government to the complaint admits the allegations of paragraphs 3 to 13 of the complaint which



in effect admits the foregoing facts and that plaintiff was properly before the District Court (App. p.6).

A jury demand was timely filed with the Clerk of the District Court by Schuyler and De Martino (App. p.8). At the beginning of the trial, Judge Metzner granted the Government's motion to strike the jury demand (S.M. p.2).

Thereafter counsel for Schuyler moved to have the Government proceed with its proof first to show that Schuyler and De Martino had violated the regulations as stated in its letter of April 1, 1974, since the statute called for a trial de novo.

The Trial Court ruled that Schuyler and De Martino had the burden of proof to show that the determination by the Department of Agriculture was invalid (S.M. p.8,1.16).

The attack on the constitutionality of the statute pleaded in the complaint was withdrawn because Schuyler and De Martino were offered full and complete hearing at this trial (S.M. p.8,9).

ARGUMENT

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| I.   | THE TRIAL COURT ERRED IN STRIKING OUT<br>THE JURY DEMAND   | 10 |
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I.

THE TRIAL COURT ERRED IN STRIKING OUT THE JURY DEMAND  
Section 13 of the Food Stamp Act provides for a trial de  
novo either in the United States District Court or in any  
court of record of the State having competent jurisdiction.  
Although this section is silent as to a jury trial, the  
following statement in Moore's Federal Practice, Vol. 5,  
p. 128.34 is applicable:

"And at times to prevent any constitutional  
question Congress may declare that the right (of a jury  
trial) shall be enjoyed, although in absence of such  
declaration jury trial would, nevertheless be enjoyed  
by virtue of the principles embodied in the Seventh  
Amendment. Statutes providing for forfeiture of property  
are illustrative of this latter proposition." Moore's  
Federal Practice, Vol. 5 p.128.24.

Steffens v. Farmers Elevator Service Co. 109F.S.16  
was an action under the Veteran's Re-Employment Act and the  
court held a right of jury trial existed and cited a number  
of cases under a variety of statutes in which jury trials  
were granted.

Fleitman v. Welsbach 240 U.S.27

Leimer v. Woods 196F2d 828

U.S. v. Freedland 94 F.S.721, and others

In the case at bar, a penalty in the form of loss  
of business for a full year has been imposed. This loss  
covers the loss of business on food stamps and the loss of  
selling additional products not food for human consumption.  
In that sense, it is analogous to the forfeiture and penalty  
cases where jury trials have been held a matter of right.

In Paley v. Greenberg 318 F.S. 1366 it was held  
that defendant was entitled to a jury trial in an action by  
a former union officer who alleged that he was wrongfully  
removed from office for having exercised his right under  
Labor-Management Reporting and Disclosure Act, section 411  
and 529 of Title 29 to freely express his views on certain  
union affairs and who sought compensatory and punitive damages  
as well as reinstatement and other equitable relief.



## II.

THE GOVERNMENT SHOULD HAVE BEEN HELD TO HAVE THE BURDEN OF PROVING THE VIOLATIONS ALLEGED BY A PREPONDERANCE OF THE CREDIBLE EVIDENCE.

Under the procedure adopted by the Department of Agriculture, there was in effect no hearing before any administrative officer. The Review Officer depended on "a file" which was given to him by others in his department. (App. p.22 Ex.8, 3rd paragraph). These files were not shown to the accused. The makers of the reports were not questioned. The procedure followed depended on the trial de novo before the Court for a full disclosure and hearing.

The statute and regulations provide for the dealer to bring the matter into court by way of summons and complaint. But once having gotten there, it should be under de novo definitions, the obligation of the Government to prove the violations alleged.

The court in Pittsburgh S.S. Co. v. Brown 171 F 2d 175 defined trial de novo as contemplating a trial anew of the entire controversy, including the hearing of evidence as though no previous action had been taken.

A trial de novo means trying the matter anew, the same as if no decision had been previously rendered 2 Amer. Jur.2d 698.

They mean that the court should make an independent determination of the issues. U.S. v. First National City Bank of Houston 386 U.S.361. In this cited case, the Attorney General and the Federal Reserve Board brought an action to

prevent the merger of two banks whose merger was approved by the Comptroller of the Currency.

One of the issues involved was the burden of proof.. The court put the burden upon the defendant banks to show that they come within the exception of the 1966 Act which allows a merger where its adverse effects are outweighed by considerations of community convenience and need. This was a primary issue and the Supreme Court held the burden of that issue lay with the defendant banks.

Similarly in the case at bar, the issue as to the actual violations having occurred as alleged is the primary issue and the Government should have had the burden of proving it by a preponderance of the credible evidence.

It was error for the trial court to place the burden upon Schuyler and De Martino who first were advised of these alleged violations eleven months after they were alleged to have occurred.



### III.

#### THE WEIGHT OF THE CREDIBLE EVIDENCE FAVORED SCHUYLER MARKET, INC. AND DE MARTINO.

The Government's entire case depended on the reports made by the investigative aides, Nydia Cabassa and Ruth Oliveras and the so-called worksheets of David Ricks who did not testify and Jeffrey Schaffler, special agents of the Department of Agriculture's Food Stamp Program.

Schaffler described himself as a special agent for the office of the Inspector General, Department of Agriculture, whose employment began May 15, 1973 . His duties were to "investigate all violations or suspected violations of new rules and regulations coming under the department's jurisdiction" including food stores for violations of the food stamp program (S.M. p.116 1.4-17).

The investigative aides duties are to go into stores and try to get ineligible items with food coupons (S.M. p 34 1.8-14).

The investigative aides were hired by agents of the Department of Agriculture who made no investigation of of these aides except to check for convictions or arrests. These aides or shoppers work at the desire or wish of the agents who pay them in cash (S.M.p. 128 1.21 to p.129 1.10). They were not required to fill out any personnel form, give



references (S.M. p.92 l.18) and got paid in cash by the agents (S.M. p 95 l.15-21). They did not receive any W-2 form. They did not report these earnings to the Welfare Department (S.M. p 97 l.1-12).

Aide Cabassa testified that she had no independent recollection as to the dates of her visits to Schuyler Market (S.M. p.38 l.14-16). Nor can she remember what items she bought on these occasions or how many food stamps she was given on these occasions by Agent Ricks (S.M.p 43,44). She could not describe persons who sold her the ineligible items (p.45).

Aide Oliveras testified similarly that without the reports written by the agents and signed by her, she could not remember any of the details.

The Court allowed these reports to go into evidence because they were read and signed by them on the same day and said it was true at the time she read it. However, it was done outside of the presence of Schuyler.

The trial court also admitted food stamp worksheets signed by the Special Agents (App. p.56-64) which they turned in to their office which are mostly repetitious of the information furnished in the statements of the aides.

Agent Ricks was not called to testify at all although he signed 6 out of the 7 reports made by the aides which are in evidence.

The worksheets and the reports of the investigative

aides were inadmissible.

In *Palmer v. Hoffman*, 318 U.S. 109 the Supreme Court held the report of the engineer involved in a grade crossing accident who died before trial, was inadmissible. The Court said:

Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading."

- (4) The Supreme Court also noted on p. 113 that if such records were to be received as a substitute for testimony, "(w)e would then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy". The statutory "shopbook" rule was designed to permit incidental testimonial use of records which are made and kept primarily for non-testimonial purposes, rather than the other way 'round.
- (5) A 'shopbook" record, compiled for primary use as an exhibit whether by a merchant or by a policeman, is inadmissible.

*Yung Jin Teung v. Dulles*, 229 F.2d 244.

These "Status Reports" would not be admissible as official records since it does not appear that they relate to matters within the personal knowledge of the persons who made the records as to which they could testify.

*Vanadium Corp. v. Fidelity* 159 F2d 105, *Olender v. U.S.* 210 F2d 795. *U.S. v. Grayson* 166 F2d 863, 868. Nor are they



admissible under 28 U.S.C.A. § 1732 as records made in the regular course of business as they appear to be reports made for the specific purpose of this litigation such as were held inadmissible in *Palmer v. Hoffman* 318 U.S. 109.

In the *United States v. Ware*, 247 F2d 698, the Trial Court permitted the Government to introduce envelopes in which agents purchased heroin from the defendant. This heroin was transmitted to a Government chemist for analysis. Various notations made by the narcotic agents concerning the purchases and the circumstances under which they were made appear on the envelopes.

The trial court also admitted certain exhibits prepared by Government chemists who made analyses of the heroin purchased by the Defendant. The exhibits are envelopes on which the chemist recorded the findings of his analyses. The exhibits were prepared out of the defendant's presence and contain the conclusions of Government witnesses as to matters which were in the jury's province to determine. They are clearly hearsay and inadmissible unless within an exception of the hearsay rule. The District Court admitted the exhibits as evidence on the theory that they qualified as business entries under the Shopkeeper's Rule, 28 U.S.C.A. § 1732.

The Court said: "And even if memoranda such as the ones in question are regularly prepared by law enforcement officers, they lack the necessary earmarks of reliability

and trustworthiness. Their source and the nature and manner of their compilation unavoidably dictate that they are inadmissible under section 1732. They are also subject to the objection that such utility as they possess relates primarily to prosecution of suspected law breakers, and only incidentally to the systematic conduct of the police business. Cf *Palmer v. Hoffman*, supra".

See also *U.S. v. Graham* 391 F2d, 439.

The worksheets (Ex. M through R-App. 56-64) were admitted into evidence under the "shopbook" rule over objection. Under the *Palmer* case, this is clearly error.

It is further pointed out that the information which the agents wrote on their worksheets was hearsay and not of their personal knowledge.

The trial court erred in admitting Ex. A (App. p.31 letter dated May 31, 1972) into evidence. This letter is dated approximately one year before the alleged violations complained of and have no connection with the letter of charges dated April 1, 1974. It is a mere repetition of a conversation seeking an explanation for a high rate of redemption which was given orally to the representative of the Food Stamp Program.



THE TESTIMONY OF THE GOVERNMENT  
WITNESSES DO NOT WARRANT BELIEF.

Cabassa testified that she wrote down what happened in the store (S.M. p.44 l. 9-14). On page 49 l.25 she said only the signature was in her handwriting and the agent filled in spaces.(S.M.p.50,l.1-19).

Cabassa, as did Oliveras, made a point of stating that they left their purses with the agent with whom they worked before they left his car to go into the Schuyler store. (S.M. p.101, l. 14 to p.102,l. 21).

Presumably, this procedure was to insure that they did not spend their own money to buy food stamps or be tempted to get some bargains on their own (S.M. p.36) Yet the agent did not ask her to empty her pockets (S.M.p.52, l 25), he did not empty or examine her purse; didn't look in it; she took no receipt from him (S.M. p 53, l.1-13). The same procedure or lack of it was followed with Oliveras.

Cabassa testified that Agent Ricks told her which articles to buy (S.M. p.56, l.1). By the time we get to last line of p.57 we find that she didn't buy what he told her to buy.

Some of the items she bought were marked NM for "no mark" or no price. Yet neither she nor the agent bothered to find out if she accounted for the right amounts or change. (S.M. p.60,61).

Cabassa said that on May 30, 1973 she saw Oliveras

give coupons to a man 55 years old, black and gray hair who took it to another man 45 years old, weighing 300 lbs. and had long hair parted in the middle. (S.M. p.47, 1.25, p.48, 1.15). This was after she read Ex.F (App. p.41). It is interesting and significant that the report of Oliveras for May 30, 1973 was not offered or introduced into evidence, although Ex P, the agent's worksheet, refers to Oliveras as the one making the report on this incident. On cross-examination, she said this 55 year old man was standing in front of the vegetable counter. She didn't know whether the vegetable counter was to the right, to the left, or straight ahead as she entered the front of the store (S.M. p.65, 1.1-25). She couldn't recall which way the man walked, but saw him go to what looked like a manager's office (S.M. p.66, 1.25). She said she bought fruit on that day (S.M. p.68, 1.5-10). Then when she couldn't show on her reports that she actually bought fruit, she said Oliveras did (S.M.68, 1 18-19). However, when Oliveras was examined, she testified that she did not buy any vegetables on May 30th (S.M. p.110. 1.20-25). When she was confronted with Ex J for identification, her statement of May 30th, she testified that she "didn't shop on the 30th. I only went in there to discount." (S.M.p.111, 1 4-14). Ex. J was never offered in evidence by the Government.

Oliveras testified on direct examination that



Ricks and Cabassa were with her on May 23 when she went to Schuyler Market (S.M. p.72, 1.23-25). When prodded by the question, "Who else", she replied "Jeffrey Schaffler" (S.M. p.73, 1.1-3).

On cross-examination, she testified that Ex G, her May 23rd and 24th statements did not show that Schaffler was present (S.M. p.100, 1.1-11). She also admitted that in her examination before trial that Schaffler was not there. (S.M. p 100, 1 17 to p. 101, 1.13).

Of the seven statements of the aides that were introduced into evidence by the Government, only Ex I of May 29, 1973 has the Schaffler name on it. These statements and the testimony of both aides are in contradiction of the testimony of Schaffler that he was present on those various dates.

Neither of the investigative aides ever asked any clerk with whom they had any transaction for their names, or tried to find out their names. The only name Oliveras got was a 55 year old "Joe". De Martino testified he never had any such man working for him.

Neither Special Agent Ricks nor Schaffler ever went into the store to check on the stories or statements made to them by their aides immediately or within any reasonable time thereafter.

Significant also is the fact that Oliveras went into the store on June 6th and sold to a man 6 feet two inches

tall, about 300 pounds, long black hair parted in the middle \$180. worth of food stamps for \$90. For this crucial and final visit no statement or report was introduced into evidence. Nor was any "worksheet" of agent Ricks or Schaffler introduced. Although Natale De Martino was in Court during trial, neither one of the aides identified him or pointed to him as the person who bought the food stamps from Oliveras.

As a Special Agent of the Government, it would seem that Ricks and/or Schaffler should have confronted the person called "Joe" and the one from whom Oliveras allegedly received the money for the stamps immediately after being advised of it. The aides could have pointed them out in person and they could have been asked to surrender or exhibit the coupons. There is that chance that the person the aides dealt with might have had no connection with the store and also eliminated the possibility of any "deal" by the aides themselves.

Schaffler testified that the investigative aides are paid in cash by the agent who works with them and is then reimbursed (S.M. p.129, 1.4-15). Neither he nor Ricks went into the store to verify the purchase of the eligible or ineligible items or the food stamps for cash (S.M.p.130, 1.15-24).

Although he anticipated, on these special cases, he might need the items purchased in the course of



administrative or judicial proceedings for purposes of evidence, they are not kept. They are listed and given to a charity (S.M. P.131, 1.8-19). There was no confrontation of the Schuyler Market personnel and De Martino with the aides or the agents on any of the occasions referred to in the letter of April 1, 1974.

Schaffler testified that he did not check the two tapes attached to Exhibits M & Q and does not check tapes. (S.M. p. 137, 1.4 to p.138 1.6.) One of these tapes had a date of May 22 which is not a date of any visit to the store. The other tape had no date on it. Natale De Martino testified that neither of these tapes came from his store (S.M. p.157, 1 12 to p.158, 1 21.) The tapes from his register has the name of the store, address and telephone number on it (S.M. p.156, 1.22,23).

With respect to the food stamps, allegedly sold in Schuyler Market premises, Schaffler testified that they recovered twenty-five \$5. stamps for a total of \$125. out of \$330. worth allegedly sold in Schuyler's premises. (S.M.p.140, 1 16 to p. 144, 1 4). What happened to other stamps? The explanation would have to be the Department's. Had the agents taken the trouble to confront De Martino or other personnel of Schuyler at the time of the incidents, there would be no need for guess work.

Knowing also that the money allegedly paid for the stamps will be needed for trial or administrative pro-

ceedings, why couldn't it have been kept by the Department and properly identified? Even the alleged receipt for the money deposited with the Treasury was not produced.

Natale De Martino and Jean Parks testified that it was a physical impossibility for anyone, that includes aides Cabassa and Oliveras to be able to physically see a person standing near the office of the store because of the obstructions (S.M. p.166, 1 1-24; p. 169, 1 17-20)

De Martino testified after looking at his payroll book and seeing the names of the people who worked there from May 23 to June 6 that none of the employees fit the descriptions given by the aides in their statements; that he did not have any employee named Joe, 55 years old, 5 foot 6 inches tall; nor anyone weighing 300 pounds, 6 foot no inches tall (S.M. p. 155, 1 6 - p. 156, 1 11).

Jean Parks testified that the tapes on the register has the date of the sale (S.M. p. 161, 1 12-18). She gave a description of herself which did not jibe with that of the aides who did not identify her in person, although she was in the room.

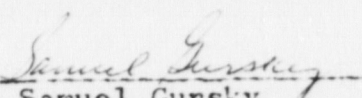
Both De Martino and Jean Parks testified that the store has three check out counters plus a speed counter and identified photographs Ex. 12 and 13 as being an accurate representation of them and the area (S.M. p. 162,163).

An analysis of the evidence presented to the court shows that the credible evidence on behalf of Schuyler and

De Martino far outweighs that of the Department of  
Agriculture.

The Judgment dismissing the complaint  
should be reversed.

Respectfully submitted

  
\_\_\_\_\_  
Samuel Gursky  
Attorney for Plaintiffs-Appellants



And J. Brown (Rt.)  
March 24 1975

